9.

SUPREME COURT OF THE UNITED STATES.

No. 418.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLANT,

vs.

JAMES T. SOUTTER AND SHEPHERD KNAPP, SURVIVORS, &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

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1 Circuit Court of the United States for the district of Wisconsin.

JAMES T. SOUTTER and SHEPHERD KNAPP, survivors, &c., complainants,
vs.
LA CROSSE & MILWAUKEE RAILROAD COMpany, J. Alfred Helfenstein, trustee, Selah Chamberlain, Newcomb Cleveland, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Leman Graham, Daniel D. Scott, Avery Hill, A. V. Rudd, E. Bradford Greenleaf, John H. Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turton, John Sercomb, Sebastian Knetzger, Frederick Lind, Edward H. Broadhead, Joshua Hathaway, William Gemell, Charles Quentin, August Sauthoff, Sebre Howard, Lawrence G. Graham, Donald G. Scott, The Milwaukee and Minnesota Railroad Company, Moses M. Davis, James Wolstenholme, Guy Tracy, Horace Galpen Edward Livermore, William Crawshay, Henry G. Gilbert, John Hardy, George W. Berrian, George Strobel, G. R. Van Allen, James G. Fulton, Moses A. Hoppock, Sereno Gaylord, C. Lewis Zimmerman, Daniel Goodwin, Stephen A. Dodge, Charles F. Dietz, William Wood, Benjamin F. Dawson, James W. Wood, John Wells, Runi Martin, R. J. Burton, D. M. Corbit, D. Farnsworth, Harvey Terry, James I. Day, W. Catlin, Bruce & Young, John M. Tufft,
2 Jonathan S. Hopper, D. S. Kingore, Noah Sturdevant, William W. Fessenden, John L. Sutherland, E. Haskett Derby, Frederick Lerick, Charles Shephard, C. P. Williams, Orville Oddie, John Pemberton, Niles Higginbotham, George Ashley, William Gould, Nathan Marble, Jacob Van Vechten, T. F. Bergen, John J. Vanderbilt, G. S. Boardman, and John Nicholson, defendants.

Be it remembered that on the 21st day of January, A. D. 1868, came the defendant, The Milwaukee & Minnesota Railroad Company, by its solicitor, Mr. Stark, and prayed an appeal to the Supreme Court of the United States from the order made on the second day of December, A. D. 1867, in the above entitled cause, which said appeal is as follows:

Appeal.

In Circuit Court of the United States for the district of Wisconsin.

JAMES T. SOUTTER and SHEPHERD KNAPP, survivors of Greene C. Bronson, deceased, trustees, *vs.* LA CROSSE & MILWAUKEE RAILROAD Company, Milwaukee & Minnesota Railroad Company, *et als.*	In equity.

Petition of Milwaukee & Minnesota Railroad Company for appeal.

To the Judges of the Circuit Court of the United States for the district of Wisconsin:

3 Your petitioner, The Milwaukee and Minnesota Railroad Company, by Joshua Stark, its solicitor, humbly complaining, respectfully represents that it is injured and aggrieved by the order of the Circuit Court in this cause, made on the second day of December, A. D. 1867, confirming the marshal's report of sale of mortgaged premises, nunc pro tunc, and by the whole of said order.

Wherefore, your petitioner prays an appeal to the Supreme Court of the United States from said order, and the whole thereof, and herewith offers to your honor a bond, according to law, to be approved by you, and prays the allowance of appeal and a citation, according to law.

Dated January 15th, 1868.

THE MILWAUKEE & MINNESOTA RAILROAD COMPANY.
By JOSHUA STARK, *Solicitor.*

(Endorsed as follows:) Appeal allowed. Bond for costs, with surety in the penalty of $500.

A. G. MILLER, *Dist. Judge.*

Bond for costs on appeal.

And same day, (January 21, 1868,) bond for costs, filed as follows:

Know all men by these presents, that we, The Milwaukee and Minnesota Railroad Company, a corporation in the State of Wisconsin, as principal, and Albert C. Gunnison and Orlando Alexander, as sureties, are held and firmly bound unto James T. Soutter,
4 and Shepherd Knapp, survivors of Greene C. Bronson, trustees, in the full sum of five hundred dollars, to be paid to the said obligees, their executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs,

executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, dated the 15th day of January, in the year of our Lord one thousand eight hundred sixty-eight.

Whereas, the above-bounden Milwaukee & Minnesota Railroad Company is about to prosecute an appeal to the Supreme Court of the United States to reverse an order made by the Circuit Court of the United States for the district of Wisconsin, on the second day of December, A. D. 1867, confirming, nunc pro tunc, the sale of mortgaged premises, in a certain cause in said court, lately depending, wherein the above-mentioned obligees were complainants, and said Milwaukee & Minnesota Railroad Company, and others, were defendants.

Now, therefore, the condition of this obligation is such, that if the said Milwaukee & Minnesota Railroad Company shall fail to prosecute its appeal to effect, and answer all damages and costs, if he shall fail to make good his said appeal, then this obligation to be void,
5 otherwise to remain in full force and virtue.

Witness our hands and seals and the corporate seal of said railroad company, at Milwaukee, in said district, this 15th day of January, 1868.

[SEAL.] MILWAUKEE & MINNESOTA R. R. CO.,
By A. S. BRIGHT, *President.*
A. C. GUNNISON. [SEAL.]
O. ALEXANDER. [SEAL.]

DISTRICT OF WISCONSIN, *ss:*

A. C. Gunnison and Orlando Alexander, being first severally duly sworn, each for himself on oath says, that he is worth the sum of one thousand dollars over and above all debts and liabilities and exemptions of property from forced sale on execution.

A. C. GUNNISON.
ORLANDO ALEXANDER.

Subscribed and sworn to before me this 21st day of January, A. D. 1868.

[SEAL.] J. F. McMULLEN,
Notary Public, Mil. Co., Wis.

Endorsed: Jan'y 21, 1868. This bond is approved. A. G. Miller, district judge.

Whereupon a citation issued.

6 UNITED STATES OF AMERICA,
District of Wisconsin ss:

I, Edward Kurtz, clerk of the Circuit Court of the United States of America, for the district of Wisconsin, do hereby certify, that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts

therefrom, and of the whole thereof now on file and remaining of record in my office, being copies of the appeal papers of the Mil. & Minnesota Railroad Company, in the case of James T. Soutter *et al. vs.* La Crosse & Milwaukee Railroad Company *et al.*, from the order of Dec. 2, 1867.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this 28th day of January, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the said United States the ninety-second.

[SEAL.] EDWARD KURTZ, *Clerk*,

7 The United States of America, to James T. Soutter, and Shepherd Knapp, survivors of Greene C. Bronson, trustees, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to an appeal in the Circuit Court of the United States of America for the district of Wisconsin, wherein the Milwaukee & Minnesota Railroad Company is appellant, and you are appellees, to show cause, if any there be, why the decree and order passed against the said appellant on the second day of December, 1867, should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twenty-first day of January, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the ninety-second.

[SEAL.] A. G. MILLER,
District Judge.

Served on the within-named James T. Soutter and Shepherd Knapp, survivors, &c., by delivering, personally, to John W. Cary, their attorney, a copy of this citation, this 23d day of January, 1868.

CASSIUS FAIRCHILD,
U. S. Marshal.

Supreme Court of the United States.

Dec. T. 1867.

NO. 418.

THE MILWAUKEE & MINNESOTA RAILROAD COMPANY

vs.

JAMES T. SOUTTER AND SHEPHERD KNAPP.

BRIEF FOR APPELLANTS.

This appeal is from the order of the Circuit Court of the United States for the District of Wisconsin, made on the 2d of December, 1867, by which the marshal's sale of the mortgaged premises described in the bill of the defendants in error was confirmed, *nunc pro tunc*, as of the 15th of May, 1863. Transcript, No. 418, p. 2.

The order of sale appears in Transcript, Nos. 414 and 415, p. 180.

The exceptions of the appellants to the confirmation of the sale appear in the same Transcript, Nos. 414 and 415, p. 14.

The argument on these exceptions is contained in the Brief filed in behalf of Vose and of Crawshay, discussing exceptions, similar in part, filed by these parties, which exceptions appear in the same Transcript, Nos. 414 and 415, pp. 20 and 25.

To that Brief, so far as regards the same points, the attention of the Court is invited.

C. CUSHING,
Counsel for Appellants.

Supreme Court of the United States.

DECEMBER TERM, 1870.

THE MILWAUKEE AND MINNESOTA RAILWAY COMPANY, Appellant,
vs.
JAMES S. SOUTTER and SHEPHERD KNAPP, Survivors, &c.

No. ~~87~~ 72.

APPELLANT'S BRIEF.

This appeal is from the order of the circuit court of the United States for the district of Wisconsin, made in this case on the 2d of December, 1867, confirming, *nunc pro tunc*, the marshal's report of the sale of the western division of the La Crosse and Milwaukee Railroad, and rejecting the petition of the appellants, praying for an account.

The sale is the same formerly confirmed by the district court, and remanded by that court to the circuit court for its action thereon.

See 5 Wallace Rep., p. 660.

In order to the proper comprehension of the appeal, reference is made to the matters following:

The order of sale by the circuit court, under which the marshal made the sale in this case, is as follows:

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WISCONSIN.

GREEN C. BRONSON, JAMES J. SOUTTER, and SHEPHERD KNAPP,
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD, and others.

January 17, 1863.

After vacating a previous order in the circuit court, of the date of January 5, 1863, confirming the marshal's sale of the

road and appurtenances, and the lands of the land grant, the court orders:

"On the motion of the complainants, by their said counsel, it is ordered by the court, that the mortgaged premises be advertised and sold by the marshal, according to the decree."

See transcript in 218 and 219, Soutter *et al. vs.* Mil. & Minn. R. R. Co., and Mil. & Minn. R. R. Co. *vs.* Mil. & St. Paul R. R. Co., p. 480.

The decree referred to in the above order, according to which the marshal is ordered to sell, is the original decree made in this case by the district court, of the date of January 6, 1862, and is found in transcript No. 280, The Milwaukee and Minnesota Railroad Company and A. Fleming, appellants, *vs.* James T. Soutter, survivor of Green C. Bronson, deceased, at p. 190.

The marshal's report of sale, together with the notice of sale, and the exceptions filed by appellants to the marshal's report of sale, are found in transcript No. 414, in the case of Crawshay *et al. vs.* Soutter *et al.*, pp. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16.

The petition of the Milwaukee and Minnesota Railroad Company, herein referred to as having been rejected by the court, in the order appealed from in this case, is to be found also in the transcript last above menticned, pp. 17, 18, 19.

THE EXCEPTIONS.

1. The marshal's notice of sale varies materially from the decree.

Where land advertised in a manner not authorized by deeree, sale set aside.

Bailey *vs.* Bailey, 9 Rich. E. R., (S. C.,) 392.

Sale made under erroneous description of premises will be set aside.

McPherson *vs.* Foster, 4 W. C. C. R., 45.
Pierce *vs.* Kneeland, 7 Wis., 224.
Blackwell on Tax Titles, 437, 251, 215.
Hoffman's Master in Chancery, 216.
2 Johns. C. R., 154.

2. The marshal gave notice of the sale, and made the sale under the decree of the district court; whereas he should have given notice and made the sale under the order of the circuit court.

Sale must be made according to the decree.

Daniels' Chancery Practice, 1273.

Sale without order of the court void.

Gray *vs.* Brignadello, 2 Wall., 636.

Shrever's Lessee *vs.* Lynn, 2 How., 60.

See further, Wambaugh *vs.* Gates, 4 Selden, (N. Y.,) 138.

At the time of sale the original order of sale by the district court had been expressly vacated by the circuit court.

Further. At the time of sale the district court were wholly without jurisdiction to order a sale of the premises.

The Mil. R. R. Co. *vs.* Soutter & Knapp, 5 Wal., 660.

The marshal, in neglecting to give notice and sell, under the decree of the circuit court, was guilty of a gross disobedience of the order of the circuit court, and consequent dereliction of duty.

3. Because the circuit court had no authority to confirm a sale made by a court having no jurisdiction in the premises.

We are clear that a sale, without a decree to sustain it, would be a nullity; and we doubt if a court can make it valid by a mere general order of confirmation.

Minn. Co. *vs.* St. Paul Co., 2 Wal., 640.

4. Because the illegal manner in which the marshal proceeded in selling the premises necessarily tended to deter bidders and chill the biddings.

5. Because the circuit court should have ordered a reference, under the peculiar circumstances of the case, to ascertain whether the property brought an adequate price.

2 Daniels' Chan. Prac., 1271–1284, 1285, 1288, 1290, 1292.

Vanbussum v. Maloney, 2 Metcf., (Ken.,) 550.
Ex parte Minor, 11 Vesey, 559.
Hoffman's Master in Chancery, 224.

6. Because the marshal's sale was by a description so vague and unsatisfactory as to prevent the property sold from bringing a fair price.

7. That the marshal, by his improper manner of sale, so acted as to deter bidders, and the property was thereby sold at a grossly inadequate price.

8. Because the marshal sold the railroad and its appurtenances under a vague and uncertain description as to the appurtenances and rolling-stock and the incumbrances thereon, and the extent and nature of the appurtenances.

9. Because the decree under which the marshal sold was defective, in not determining the franchise, a right of possession to be acquired by the purchaser.

The Supreme Court refer to the orders and decrees of foreclosure and sale in this case as wanting in clearness, and say, before ordering sale the court should have made clear all these ambiguities. (2 Wall., 641.)

10. Because the marshal sold the railroad and its appurtenances and franchises separate from the lands, whereas, the lands being incident to the franchise of the railroad and inseparable therefrom, all should have been sold together.

11. Because marshal made no report to the circuit court of the sale, but referred the circuit court to the report he had previously made to the district court.

12. Because the marshal has not returned to the circuit court the proceeds of the sale.

13. Because the bonds paid to the marshal have been improperly withdrawn from the district court, in behalf of the purchasers, in fraud of the rights of the holders of said bonds,

and the circuit court ought not to confirm a sale without having control of the proceeds of the sale.

The order appealed from in this case confirms the marshal's sale, *nunc pro tunc*.

This principle, we submit, cannot be applied in this case, as a court can only confirm *nunc pro tunc* some act which might have been done previously by the court making the order, and the delay has been occasioned by the court itself.

3 Manning, Granger & Sc., 970.

W. W. Boyce,
Counsel for appellant.

SUPREME COURT

OF THE

UNITED STATES.

MILWAUKEE & MINNESOTA RAILROAD CO., *Appellant,*

against

JAS. T. SOUTTER AND SHEPHERD KNAPP, Survivors, &c., *Appellee.*

Brief for Appellee.

JOHN W. CARY, *Of Counsel.*

Supreme Court

OF THE

UNITED STATES.

JANUARY TERM, 1869.

THE MILWAUKEE & MINNESOTA RAILROAD COMPANY,
Appellant,
against
JAMES T. SOUTTER AND SHEPHERD KNAPP, Survivors, &c.,
Appellee.
No. 72.

This is an appeal taken by the Milwaukee & Minnesota Railroad Company in January, 1868, after the causes in which the appellant was interested had been set down for argument by this Court, and which were heard in February, 1868, and for that reason was not included in the list of cases then disposed of.

It is an appeal from the order of confirmation made in this, (the Land Grant foreclosure,) cause, on the 2d day of December, A. D. 1867, by the Circuit Court for the District of Wisconsin, Justice Davis and Judge Miller presiding. Which said order is in the words and figures following, to-wit:

ORDER OF CONFIRMATION

JAMES T. SOUTTER AND SHEPHERD KNAPP, Survivors, &c.,

vs.

THE LA CROSSE & MILWAUKEE R. R. CO., J. ALBERT HELFENSTEIN, Trustee, et al.

} IN EQUITY.

This day came the parties by their counsel, and on consideration of the report of sale by the marshal in this case, the several exceptions thereto by the Milwaukee & Minnesota Railroad Company and Francis Vose, and also their several petitions, and also the motion in behalf of complainants for confirmation of said sale, and the arguments of counsel thereon, it is ordered by the Court that the said several exceptions to said sale and report be, and are hereby overruled.

And it is further ordered by the Court that the petition of the Milwaukee & Minnesota Railroad Company be and the same is hereby denied. And it is further ordered by the Court that the said petition of Francis Vose be, and the same is hereby, denied except as to that part claiming payment of five bonds of the La Crosse & Milwaukee Railroad Company, included in the decree in this case.

It is further ordered by the Court, that the sale so made by the marshal, and the report thereof by him to the present term of this Court, in pursuance to a mandate of the Supreme Court, be, and the same is hereby confirmed as of the fifth day of May, eighteen hundred and sixty-three, with the same effect to all intents and purposes as if confirmed by this Court on said day.

This order of confirmation is made subject to the payment to Francis Vose, by the Milwaukee & St. Paul Railway Co., of five bonds of one thousand dollars each, with all accrued and unpaid interest on

the same, upon the surrender by him to said company of the certificates issued to him by the trustees, and all claims for dividends on them.

The Court hereby reserves the power to rescind or modify this order of confirmation, at the ensuing term of this Court if said five bonds, with interest are not paid.

DAVID DAVIS.

A. G. MILLER.

The record in this case does not contain the order appealed from or any of the proceedings leading to it. They will be found in the record numbered 414 and 415 of December Term, 1867.

Three appeals were taken from this order of confirmation: One by William Crawshay and Orville Oddie, No. 414, Term of 1867; another by Francis Vose, No. 415, Term of 1867; and this appeal, which was originally No. 418, Term of 1867.

No.'s 414 and 415 were heard in February, 1868, with the other causes relating to this litigation, and were argued by Mr. Ryan for appellants. The order was affirmed and is reported in 6 Wallace 739.

The decisions made in this litigation at the December Term, 1867, and reported in 6 Wallace pp. 739 to 756, disposed of the whole controversy, and as we are informed, this appeal is in fact abandoned by the appellant.

We do not, therefore, for the reasons above stated, deem it necessary to argue the merits of the case as it appears in the record above referred to, and as it has already been adjudicated in this Court as we understand it. We therefore submit the same without argument, asking that the order appealed from may again be affirmed.

JOHN W. CARY,

Of Counsel for Appellee.